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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 444.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION,

Petitioner,

vs.

JAMES G. SMYTH, COLLECTOR OF INTERNAL REVENUE OF THE FIRST INTERNAL REVENUE COLLECTION DISTRICT OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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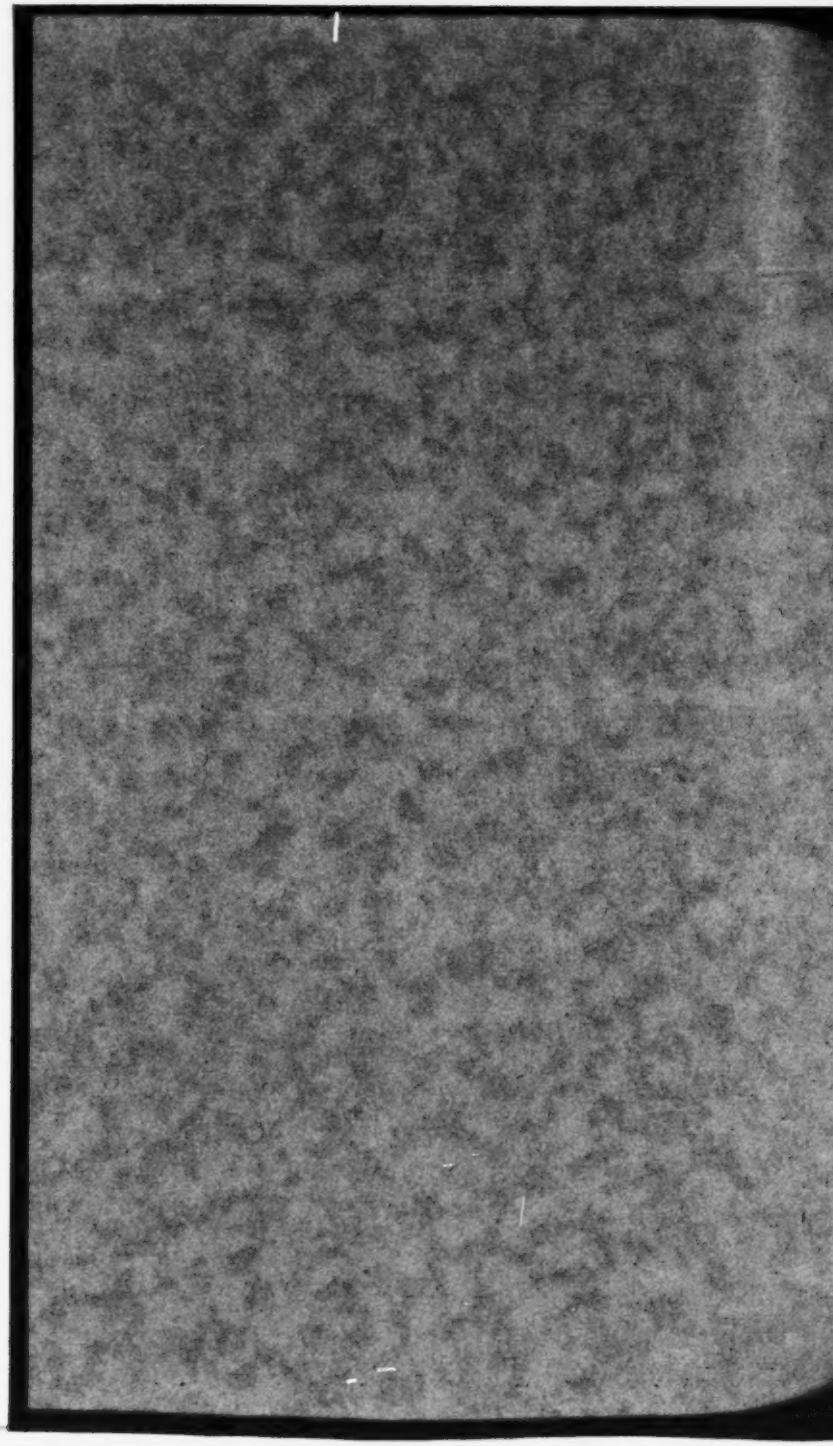

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PETITIONER'S REPLY BRIEF.

Argument.

It is desired first to correct several patent errors which appear in Respondent's brief. On page 6 thereof, Respondent states that "An additional privilege of membership was the right to obtain automobile insurance at cost," and the same statement is made in the first paragraph on page 8 of said brief. These statements are subject to the qualification that not all members of Petitioner are entitled to obtain automobile insurance at cost, so that such "right" was not absolute, and further that such insurance was not furnished by Petitioner at all but by the Inter-Insurance Bureau, which is not a part of Petitioner but a separate and distinct corporation. [R. 126-127, 140-141.]

Also on page 8 of Respondent's brief, it is stated that "There were no club activities." Such statement is quite contrary to the fully established facts, based upon the uncontradicted testimony of witnesses, and set forth in the District Court's Findings of Fact, paragraph XVII of which states, so far as pertinent:

> "That Plaintiff has annual meetings of its members, meetings of its board of directors, and other meetings occasionally called by the Plaintiff and its standing committees, which meetings members are entitled to attend." [R. 86.]

Petitioner has a board of directors of 21 members and 10 standing committees, each of the latter consisting of 5 members. [R. 176-181.]

In Note 1 on page 7 of Respondent's brief, reference is made to the cases of two other organizations similar to the Petitioner, viz., *Chattanooga Automobile Club v. Commissioner,* 12 T. C. 967, and *Keystone Automobile Club v. Commissioner,* 12 T. C. 1038, both of which cases are now pending on appeal in the Court of Appeals for the Sixth Circuit and the Third Circuit, respectively.

It will be noted that in the *Chattanooga* case, the first of such cases to be decided by the Tax Court of the United States, there were dissents by four Judges and two separate, lengthy and strongly dissenting opinions. In fact, the two dissenting opinions are far more analytical than the majority opinion. The latter is quite brief and begins with the statement:

> "The Commissioner has provided in his regulations for many years that an organization will not be deemed exempt if it engages in traffic for profit, Regulation 33, Article 72 to Regulation 111, Section

29.101(9)-1, although a profit from an activity merely incidental to its primary purpose might not render it subject to tax."

From the above quotation it would seem the Tax Court considered that the Chattanooga Automobile Club was engaged in traffic for profit. Reference to "traffic for profit" was taken from the Treasury Regulations which have been quoted by Respondent in its brief on pages 12 to 15 thereof. The language from Article 101(9)-1, Treasury Regulations 101, upon that point read:

> "If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes."

There was nothing in the Findings of Fact of the Tax Court in the *Chattanooga* case to indicate that Club was engaged in traffic for profit. Likewise, such a purpose or such an activity is not found among those of Petitioner in the instant case. It seems clear that "engaging in traffic for profit" means the carrying on of a commercial transportation enterprise, and that such an activity was entirely foreign to both the Chattanooga Automobile Club and to this Petitioner. Reference is made in this connection to the District Court's Finding No. XII in the instant case:

> "That none of the normal activities or the war-time activities of the Plaintiff were conducted for the purpose of earning a profit or accumulating a surplus, nor was any profit derived from any of these activities [R. 84-85]."

It is believed that the following statement in the dissenting opinion of Judge Harlan in the *Chattanooga* case is not only true, but that it goes to the heart of one of the misconceptions on the part of the Court of Appeals for the Ninth Circuit in the present case:

> "While the activities of local automobile clubs have changed somewhat in detail with the growth in automobile traffic, the purposes of those activities have remained constant."

The historical background of Section 101(9) of the Code, as well as the Commissioner's attitude toward that and prior practically identical exempting provisions of the tax laws, is accurately stated in the dissenting opinion (joined in by three other Judges) of Judge LeMire in the *Chattanooga* case:

> "Substantially the same provisions as those contained in section 101(9), above, have appeared in every revenue act since the Act of 1913. Section 11(a) Ninth of the 1916 Act, for instance, exempted any 'Club organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member.' From its inception, the Commisisioner construed the section as granting exemption to automobile clubs such as the petitioner. It was not until 1943 that he reversed his position, ruling in *G. C. M. 23688,* 1943 C. B., p. 283, that an association functioning as a federation of automobile clubs was not a club within the meaning of section 101(9), Internal Revenue Code, and was not organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes within the meaning of that section."

The later statement of Judge LeMire in the same case is quite pertinent:

"Undoubtedly, there are many organizations like the petitioner which, in reliance upon the contemporaneous administrative construction of the statute, have adopted forms of organization and policies carefully designed to preserve their tax exempt status. I do not think that they should now be held taxable under a changed construction of the statute which is at best doubtful. The Supreme Court spoke out in strong disapproval of such a course in *Helvering v. Griffiths,* 318 U. S. 371 [43-1 U. S. T. C., §9319], a case involving the taxability of stock dividends. The Court said:

" 'We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway.' "

The decision of the Tax Court in *Keystone Automobile Club v. Commissioner, supra,* cited in Respondent's brief, merely follows the decision in the *Chattanooga Automobile Club* case, *supra,* which is stated to be controlling. It is interesting to note that the opinion in the *Keystone* case was written by Judge Opper, who agreed with both of the dissenting opinions in the *Chattanooga* case.

Note 2 on page 7 of Respondent's brief makes brief reference to the doctrine of *ejusdem generis* and interpolates the word "similar" in Section 101(9) of the Internal Revenue Code before the words "non-profitable purposes."

This Court had occasion to consider the rule of *ejusdem generis* and the limitations thereon in *Helvering, Commissioner of Internal Revenue, v. Stockholms Enskilda Bank,* 293 U. S. 84, 79 L. Ed. 211, where it said:

> "But it is said that the phrase in question must be restricted in accordance with the rule of *ejusdem generis.* The point is not without merit. The phrase reads 'interest on bonds, notes, or other interest-bearing obligations.' If the rule invoked be held controlling, it would follow that the general words 'other interest-bearing obligations' must be assimilated to the particular words 'notes and bonds,' and restricted to obligations of the same kind. But while the rule is a well-established and useful one, it is like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of *ejusdem generis* is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a

whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail."

In *State of Texas et al. v. United States et al.,* 6 Fed. Supp. 63, page 65, the Court said:

> "First of all, the rule *ejusdem generis* is a rule of construction only 'to be used as an aid in the ascertainment of the intention of the lawmakers, and not for the purpose of subverting such intention when ascertained.' *Mid-Northern Oil Co. v. Walker,* 268 U. S. 45, 49, 45 S. Ct. 440, 441, 69 L. Ed. 841."

Additionally, it might be observed that the phrase "pleasure and recreation" in Section 101(9) of the Code is clear and unambiguous, and it is difficult to conceive of additional "non-profitable purposes" so like pleasure and recreation as to require the application of the doctrine of *ejusdem generis.* On the contrary, we believe that "other non-profitable purposes" in Section 101(9) was clearly intended to enlarge the field of purposes which would still entitle a club to exemption, even though not found within the well understood meaning of "pleasure and recreation * * * purposes," and that the war-time services rendered without profit by Petitioner should be held to fall within the category of "other non-profitable purposes," particularly since they precisely fit that description. Otherwise it would seem that the interpolation of the word "similar," as suggested by Respondent, could be used to defeat the exemption of every other type of non-profit or charitable corporation which engaged in volunteer war work.

Further, we believe it is hardly open to question that the emergencies created by the late war forced changes in the operations of numerous corporations and other organizations throughout the country, as, for example, where labor and materials were scarce or, at times, practically unobtainable, and that the rendition of patriotic services, either voluntarily or because of changed conditions over which such organizations had no control, should not be used to impair or defeat rights otherwise available to them under the law.

Respondent makes reference to the fact that the Treasury Regulations dealing with Section 101(9) are entitled "Social Clubs" and that all contain the following or similar phrase: "The exemption granted by Section 101(9) applies to all social and recreation clubs * * *." We believe it only fair to complete Respondent's quotation from the Regulations by adding after the word "clubs" the following phrase which there appears: "which are supported by membership fees, dues, and assessments." Petitioner is supported by membership fees and dues. [Finding of Fact XV, R. 85.] It is interesting to note, also, that the same Treasury Regulations (Resp. Br. p. 15) state further that "If a club engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, *or* social purposes. * * *" (Italics supplied.) The Regulations themselves thus recognize that there are clubs entitled to the exemption granted by Section 101(9) of the Code which are organized and operated exclusively for pleasure and recreation *as distinguished from* social purposes. The fact that the Treasury Regulations, *supra,* under Section 101(9)

are headed "Social Clubs" does not, therefore, indicate that exempt clubs were limited to social clubs, and it seems obvious that the heading was adopted merely for the purpose of brevity and because there were a great many clubs with social features, such as country clubs, which were granted exemption. The very use of the disjunctive in the Regulations, *supra,* makes it abundantly clear that exemption was not to be confined to "social clubs" alone.

Respondent asserts that Petitioner is not a club because there was no provision made for social intercourse and there was no real commingling of the bulk of the membership.

So far as Petitioner meeting the definition of "club" is concerned, there are numerous definitions of the term, all of them indicating clearly that Petitioner qualifies for such classification. The New International Encyclopedia, Volume 5, pages 487 *et seq.,* defines the word "club" as follows:

> "A word said to be derived from the Saxon cleofan, to divide—a club being an association the expenses of which are shared among the members."
>
> *"The Automobile Club of America,* devoted to the advancement and regulation of motoring was established in 1890 and has 1,660 members. *The Aero Club of America,* founded in 1906 for the promotion of aernoautics, now has 340 members." (Italics supplied.)

Webster's New International Dictionary sets forth, among other definitions of the word "club," the following:

> "To unite for a common end, or contribute to a common stock; as to club exertions. * * *"
>
> "Intransitive—To form a club; to combine for the promotion of some common object; to unite."

In the above definitions of the term club, and in other definitions, no reference is made to the necessity for social intercourse or commingling of the bulk of the membership to qualify as a club.

On page 8 of his brief, Respondent refers to "the so-called 'member'," and asserts that "the 'member' was not joining a club but was purchasing services."

The Record is replete with references to members and membership in Petitioner Association, and "Membership" is specifically dealt with in Article III of Petitioner's Articles of Incorporation quoted on page 6 of Respondent's brief. The initiation fees of new members and the annual dues of members, together with membership qualifications, are referred to in the testimony of Petitioner's witnesses as, for instance, at R. 134 and 135.

Respondent asserts Petitioner is neither organized nor operated exclusively for pleasure and recreation. In reply, it may be stated that there is a large number of cases in which the form of organization of a corporation, the statutes under which it was organized, and powers outlined in the charter, have been held not decisive of the question as to whether it was actually "organized" for such purposes.

In *Commissioner v. Battle Creek, Inc.*, 26 F. 2d 405, the corporation was organized under the general corporation laws and was authorized to conduct "any lawful business." The corporation was not denied exemption simply because it was so organized. The Court said:

> "It is not unusual for charters of corporations to grant broad powers and privileges that are never intended to be used."

It is believed the Court will take judicial notice of the fact that many corporations are so organized.

See also:

Koon Kreek Klub v. Thomas, 108 F. 2d 616;

Anderson Country Club v. Commissioner, 2 T. C. 1238;

Sands Springs Home, 6 B. T. A. 198;

Roche's Beach, Inc. v. Commissioner, 96 F. 2d 776;

Unity School of Christianity v. Commissioner, 4 B. T. A. 61;

Goldsby King Memorial Hospital, 3 T. C. M. 693;

I. T. 1914, III-1, Cumulative Bulletin, Bureau of Internal Revenue, 287;

I. T. 2325, V-2 C. B. 63;

A. R. R. 218, III C. B. 238.

Both the Court of Appeals for the Ninth Circuit and Respondent refer to the use of passenger cars by commercial agents and the employment of such cars in the conduct of daily business, asserting that Petitioner's facilities were, therefore, used to some extent for purposes other than pleasure and recreation. It is respectfully urged that this is not the proper criterion by which to decide the question of Petitioner's exemption under Section 101(9) of the Code, since the purpose of Petitioner is not to be determined by the use to which its facilities may sometimes be put by its members. It would be entirely erroneous, we believe, to deny tax exemption to a luncheon club or a golf club simply because some of the members of such clubs use the club facilities as a means of making and continuing business and professional contacts which are

intended to and actually do serve the business and professional, rather than the pleasure and recreation, interests of such members. Such a practice has, for many years, been so widespread and so well known that it is believed the Court will judicially notice the practice. In fact, in some cases the making of business contacts or furthering business or professional interests is the sole or practically the sole reason for taking out such memberships, and in *Johnson v. United States,* 45 Fed. Supp. 377, dues paid to two country clubs were held to be deductible as business expenses of two members who paid such dues for the purpose of obtaining business.

In addition, we believe that the Treasury Department was fully cognizant in 1929, when Petitioner's Articles of Incorporation were amended [Resp. Br. p. 5 and R. 227-228], that passenger cars might be put to commercial use and were so being used. In any event, it was the policy of the Government at that time to allow exemption of automobile clubs generally [see Petitioner's Brief in Support of Petition for Certiorari p. 14, and R. 106-107], in spite of the fact that obviously there must have been wide variations and occasional changes both in Articles of Incorporation and By-Laws of such clubs.

See also:

I. T. 2296, V-2 C. B. 65;

S. M. 5516, V-1 C. B. 81;

Pasadena Methodist Foundation, 2 T. C. M. 905;

Orton Ceramics Foundation v. Commissioner, 9 T. C. 533.

Respondent appears to be clearly in error in stating on page 9 of his brief that "No bona fide dispute exists as to the nature of the California State Automobile Association or its activities * * *" On the contrary, such a dispute does exist and forms the issue in the present case. Also, for example, Respondent contends that the Association is not a club and appears to question, as indicated on page 8 of his brief, whether or not there were members. Not only has the District Court found that the Association is a club, but the fact that it has members is referred to in numerous findings of that Court [R. 82-89]. We consequently believe that Respondent is quite in error in asserting that Petitioner's contention in its Petition for Certiorari and Brief in Support Thereof that the Court of Appeals failed to give effect to Rule 52(a) of the Rules of Civil Procedure is without merit.

Strange, indeed, is the argument of Respondent on pages 9 and 10 of his brief that Petitioner's contention that the Court of Appeals was bound to give effect to early *informal administrative rulings* is without merit. Respondent says that such rulings lack the dignity and effect of Treasury Regulations, etc. Petitioner's argument in its Petition for Certiorari and Brief in Support Thereof in this connection is made on pages 16 to 19 and makes no reference whatever to "informal administrative rulings." On the contrary, Petitioner's contention was there stated to be that for a period of thirty (30) years from 1913 to 1943, the Commissioner of Internal Revenue had exempted Petitioner from the payment of any income tax under an administrative construction repeated again and again with no material change in a number of successive *Regulations* issued under various Revenue Acts, and finally

under the codification of such Acts in the Internal Revenue Code.

The reference there plainly is to Treasury Regulations, prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. Such Regulations, to which Petitioner referred, are of the highest dignity and standing within the Treasury Department in the interpretation of the tax laws. It was to these authoritative *Regulations,* and not to mere *informal administrative rulings,* to which reference was made by Petitioner, as above stated; and the rule relied upon by Petitioner, as set forth in its Petition and Brief, is one established by this Court, viz., that such administrative construction of a provision of a tax statute acquires the force of law by virtue of subsequent reenactments by Congress of such provision. Several decisions of this Court stating such rule were cited in our Brief at pages 17 and 18.

Respondent then cites G. C. M. 23688, 1943 Cum. Bull. 283. It is pertinent here to point out that a G. C. M.—General Counsel's Memorandum—is inferior in standing and authority to Treasury Regulations. As the basis for an adverse decision against Petitioner, G. C. M. 23688 signally fails for a number of reasons. In the first place, the "M Association," which is the subject of that Memorandum, is obviously a nationwide federation of automobile clubs, as it is stated therein that the Association functions to a large extent as a "federation of automobile clubs" and as "the managing agency of several local automobile clubs" [R. 45-47, 107, 217, 220-221, and quoted in part on pages 15-21 of Respondent's Brief.] In addition, in the said Memorandum we find that "individuals

who are, or become, affiliated with this corporation *shall not be members,* but shall be classed as regular and honorary associates * * *" (italics supplied).

The M Association is wholly unlike Petitioner as the latter, whose functions are set forth at length in the Record, does not function as a federation of automobile clubs or as a managing agency of local automobile clubs, nor does it conduct or participate in any such functions. Likewise, Petitioner has no member clubs. [R. 181-182.]

Petitioner is sharply distinguished from the M Association, also, in that it bears no resemblance whatsoever to the organization described in G. C. M. 23688 where "Arrangements have also been made with certain merchants in one area whereby members of one of the local organizations may purchase clothing, laundry, furniture, and automobile supplies at less than the usual selling prices of such articles." Petitioner does none of these things. [R. 175.]

Another difference between Petitioner and the M Association is that, in the latter, individual members have no right to vote in the affairs of the corporation, whereas in Petitioner, the individual members have such rights and the Record shows they do vote and otherwise actively participate in the affairs of the corporation. [R. 179-181.]

Again, there is a radical difference between Petitioner and the M Association, which latter is stated in G. C. M. 23688 to operate "in the nature of a non-profit cooperative

buying association," as Petitioner engages in no such activities whatever. [R. 173-174.]

A careful comparison of the activities and operations of Petitioner and the M Association shows the former to be widely divergent from the latter in practically every respect.

Respondent refers to G. C. M. 23688, *supra,* as being characterized in 6 Mertens, Law of Federal Income Taxation, Section 34.30, page 63, as an extended and well considered opinion. It is enlightening in that connection to quote further from the same Section 34.30 where, after quoting the Treasury Regulations under Section 101(9) of the Code, Mertens says:

> "Exemption is not given under this section to a club which is an association of clubs and *has no individual members.*
>
> "Illustrations of social clubs granted exemption are numerous. Exemption has been granted to clubs formed for the purpose of (1) providing for members a meeting place and dining room, (2) promoting the principles and interests of a certain political party, (3) college fraternities, (4) *automobile clubs organized to promote good roads, such clubs having been declared to be exempt even though an organization incidental to the main purposes of the club publishes a revenue-producing magazine, or the club places insurance for members, and receives commission for such work,* and (5) clubs organized to facilitate greater use of mountains. * * *" (Italics supplied.)

In a footnote on said page 63, Mertens, referring to G. C. M. 23688, *supra,* comments that "In a prior ruling (G. C. M. 3555, C. B. VII-1, p. 117 (1928)) the same association had been held to be exempted under Sec. 231 (9) of the Revenue Act of 1926, which is a corresponding provision to Sec. 101(9) of the Code, but at the time of that ruling the association had *individual* as well as club members. In 1941 the by-laws of the association were changed to *exclude* individual members." (Italics supplied.)

It is quite obvious, therefore, that one of the principal reasons why the M Association lost its tax exemption was because the by-laws in 1941 were changed to exclude individual members.

Respondent, in his Brief, finally urges that the Regulations, while not dealing specifically with automobile associations, fully support the Collector's position here. In answer to that argument, attention is again invited to the fact that under essentially identical Regulations from 1916 to 1943, the very Regulations relied upon by Respondent and appearing in the Appendix to his brief on pages 12 to 15, the Commissioner of Internal Revenue, without interruption, and actually from 1913 on, had granted exemption to Petitioner itself, as well as to automobile clubs in general. [R. 106, 107, 155.] At the time such exemption was withdrawn from Petitioner there had been no change either in the law or the Regulations.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari herein should be granted and that the decision of the United States Court of Appeals for the Ninth Circuit should be reviewed and finally reversed by this Honorable Court.

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